

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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NYNEX/Teleport Arbitration) D. P. U. 96-73/74
NYNEX/Brooks Fiber Arbitration) D. P. U. 96-75
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BELL ATLANTIC-MASSACHUSETTS

COMMENTS ON

UNBUNDLED NETWORK ELEMENT PROVISIONING UNBUNDLED NETWORK ELEMENT PROVISIONING

In this stage of the Consolidated Arbitrations, the Department has been addressing the question of whether Bell Atlantic-Massachusetts ("BA-MA") may be required, and if so under what terms, to provide combinations of unbundled network elements to other carriers pursuant to the Telecommunications Act of 1996 ("Act"). With the issuance by the FCC of its UNE Remand Order on November 5, 1999, and its Supplemental Order of November 24, 1999, some of the legal uncertainty that has surrounded the offering of UNEs and network element combinations by incumbent Local Exchange Carriers ("ILECs") has been resolved. The Department has, accordingly, requested that the Parties address the effect of the FCC rulings on matters still under consideration in this stage of the proceeding. Among the open matters before the Department are: (1) AT&T's Motion for Reconsideration of the Department's Phase 4-K Order; (2) BA-MA's filing of June 18, 1999, made in compliance with the Department's Phase 4-K Order; and (3) the interpretation of the FCC rule requiring ILECs to provide requesting carriers with existing assembled UNEs. See Department Procedural Notices of October 27, 1999 and November 10, 1999. Following a brief review of this stage of the proceeding, BA-MA addresses each of these issues.

I. BACKGROUND

In the Local Competition First Report and Order, the FCC issued rules that prohibited an ILEC from separating UNEs that are already combined in its network before leasing them to competitors (47 CFR §51.315(b)) and which required an ILEC, upon request, to combine UNEs that are not currently combined in its network as well as to combine UNEs with elements provided by another carrier (47 CFR §51.315(c)-(f)). All of these rules were, however, declared invalid by the Eighth Circuit Court of Appeals on the ground that they were contrary to §251(c)(3) of the Act. See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). Based on that ruling, the Department decided in the first of its orders in this stage of the proceeding – the Phase 4-E Order of March 13, 1998 – that it would not compel BA-MA to provide UNE combinations to other carriers.

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Following the Phase 4-E Order, the Department proceeded to conduct a narrow inquiry – how BA-MA would provide access to individual network elements to CLECs so that they could combine those elements themselves. BA-MA proposed new collocation arrangements to enable CLECs more efficiently to combine individual unbundled elements. In addition, BA-MA proposed, as a compromise, voluntarily to provide certain UNEs in combination associated with two new offerings – Enhanced Extended Loop ("EEL") service and Switch Sub-platform. See BA-MA's April 17, 1998, Submission On Unbundled Network Element Provisioning. The Department held several days of evidentiary hearings, and the Parties filed briefs on BA-MA's proposals.

While a Department decision was pending, the Supreme Court of the United States issued its decision in *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721 (1999), which reviewed certain aspects of the Eighth Circuit's ruling. The Supreme Court reinstated the FCC rule – voided by the Eighth Circuit – prohibiting an ILEC from separating UNEs that were already combined in its network (47 C.F.R. §51.315(b)). *AT&T v. Iowa Utilities Bd.*, at 736-738. The Supreme Court did not, however, reverse the Eighth Circuit's invalidation of the FCC's rules requiring an ILEC to combine elements that are not currently combined in its network and to combine UNEs with the CLEC's network elements (47 C.F.R. §51.315 (c)-(f)). Those rules remain vacated. In addition, the Supreme Court vacated the FCC's rule defining what network elements must be unbundled (47 C.F.R. §51.319) because the FCC had ignored the Act's directive to consider whether access to a facility is "necessary," and whether failure to provide such access would "impair" the ability of the CLEC to provide telecommunications services, before determining whether the facility is a network element. *Id.*, at 30-40. The issue of which facilities are network elements, and therefore subject to the § 251(c)(3) unbundling requirements, was remanded to the FCC for determination in light of these considerations.

The Department received comments from the parties regarding the impact of the Supreme Court's decision and issued its Phase 4-J Order on March 19, 1999. The Department found that because BA-MA committed to the FCC to continue to provide the individual UNEs in the vacated FCC Rule 319 pending the FCC's remand proceeding, BA-MA was obligated also to comply with FCC Rule 315(b) regarding the provision of existing assembled UNEs. See Phase 4-J Order, at 9. The Department did not, however, reach the issue of access to UNEs that did not already exist in combined form in BA-MA's network – the elements subject to the still vacated FCC Rule 51.315 (c)-(f).

The Department addressed access to uncombined UNEs in its Phase 4-K Order of May 21, 1999. The Department accepted BA-MA's proposal to provide voluntarily the EEL and Switch Sub-platform combinations. See Phase 4-K Order, at 22. The Department ordered BA-MA to file tariffs for these offerings by June 11, 1999. BA-MA complied with that directive. BA-MA's proposals are currently under review by the Department in D.T.E. 98-57.

In addition, the Department accepted BA-MA's enhancements to its collocation offerings, which included making available virtual collocation statewide, smaller physical collocation cage sizes (25 square feet), cageless collocation within the secured collocation area, the sharing by carriers of physical collocation space, and the assembly room. *Id.* The Department directed that BA-MA file tariffs for these offerings by June 11, 1999. These offerings had, however, already been included in tariffs filed by BA-MA in D.T.E. 98-57 on April 2, and May 28, 1999. These proposals are presently under review in that docket.

Finally, the Department found that it would not mandate a recombination requirement on BA-MA for previously uncombined UNEs, but directed BA-MA to develop "an additional, alternative or supplemental method for provisioning previously un-combined UNEs in such a way that they can be recombined by competing carriers without imposing a facilities requirement on those carriers." *Id.*, at 26-27. The Department suggested that BA-MA should "consider providing combinations of previously uncombined UNEs, perhaps with a glue charge applicable only to combinations of previously uncombined UNEs." *Id.*, at 27. The Department directed

BA-MA to file a plan by June 18, 1999.

In compliance with the Phase 4-K Order, BA-MA made a filing in which it offered to voluntarily provide CLECs with the UNE-P, where the loop and local switching UNEs are not already combined. BA-MA offered to make the arrangement available for the provision of residential and business POTS service and residential and business Basic Rate Interface ISDN service (BRI ISDN switch port and premium loop), under the following terms and conditions.

BA-MA-combined UNE-P arrangements would be available for residence service in all central offices and for business service only in central offices where no collocation arrangements existed.

BA-MA-combined UNE-P arrangements would be provided with a "glue fee" as authorized in the Phase 4-K Order.

BA-MA-combined UNE-P arrangements would be offered until 2003.

BA-MA also proposed to provide other uncombined UNEs – which may exist in combined form elsewhere in BA-MA's network – less than the total platform (i.e., that do not involve combining loop and local switching UNEs) via a bona fide request ("BFR") process. That process would enable BA-MA to examine technological feasibility and to assess the costs associated with engineering, provisioning, and the development of any necessary operational support systems.

The Department had not begun its consideration of BA-MA's June 18th compliance filing when the FCC released its November 5, 1999 UNE Remand Order. In its Order, the FCC responded to the Supreme Court's directive in *AT&T Corp. v. Iowa Utilities Bd.* that the agency consider the Act's unbundling requirement under the "necessary" and "impair" standards in § 251(d)(2), and develop a limiting standard that is "rationally related to the goals of the Act." The FCC affirmed most of its prior findings as to the required set of network elements that ILECs must provide on an unbundled basis and imposed several new unbundling requirements on ILECs, for example, subloop unbundling and dark fiber. The FCC did, however, exclude several network elements from the unbundling requirement of § 251(c)(3). Those exclusions have an impact on the offerings that have been at issue in this stage of the proceeding, as discussed below.

II. DISCUSSION

Impact of the FCC's UNE Remand Order

The Department has focused almost exclusively on three forms of combinations in this stage of the proceeding – loop and local switching, known as the UNE-P arrangement; loop and transport, known as the Enhanced Extended Loop ("EEL"); and BA-MA's Switch Sub-platform proposal. The FCC's UNE Remand Order has an impact on each of these combinations. The Department has focused almost exclusively on three forms of combinations in this stage of the proceeding – loop and local switching, known as the UNE-P arrangement; loop and transport, known as the Enhanced Extended Loop (EEL); and BA-MA's Switch Sub-platform proposal. The FCC's UNE Remand Order has an impact on each of these combinations.

1. Existing Loop and Local Switching Combinations

Consistent with the Department's Phase 4-J Order, BA-MA offers existing combinations of local loops and local switching in the form of the UNE-P. The offering is available today in all of BA-MA's central offices throughout Massachusetts for all classes of service without restriction. Four carriers have completed the network design process necessary to establish a presence in each of BA-MA's local switches, and several of these carriers have placed orders with BA-MA for existing UNE-P. BA-MA provides the elements comprising the existing UNE-P offering at the Department-approved TELRIC rates.

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The FCC's UNE Remand Order affects the offering in three respects. First, the FCC recognized an exception to the unbundling requirement of § 251(c)(3) of the Act for local switching. Specifically, the FCC found that

requesting carriers are not impaired without access to unbundled local circuit switching when they serve customers with four or more lines in density zone 1 in the top 50 metropolitan statistical areas (MSAs) ¼ where incumbent LECs have provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout density zone 1.

Where these conditions exist, local switching is not a network element that must be provided by an ILEC under § 251(c)(3).

There are eight central offices in the Boston MSA that meet the FCC's Density Zone 1 criteria. Since BA-MA provides EELs throughout Massachusetts, including the Density Zone 1 offices, under the FCC's UNE Remand Order, BA-MA is not obligated under § 251(c)(3) of the Act to provide unbundled local switching – alone or in combination with loops – to CLECs for use in provisioning service to customers with 4 or more lines in the Density Zone 1 offices.

The exception created by the FCC removes unbundled local switching from the requirements of § 251(c)(3). However, the FCC noted that a Bell Operating Company is still required as a condition for InterLATA relief to provide local switching unbundled from local transport, local loops and other services under § 271(c)(2)(B)(vi) of the Act. The FCC stated that the difference between the unbundling obligations of § 251(c)(3) and the competitive checklist network elements of § 271 was principally one of pricing. The FCC ruled that the TELRIC pricing standard set forth in § 252(d)(1) of the Act – governing § 251(c)(3) unbundled network elements – was not applicable to § 271 elements. Rather, the FCC explained that such elements could be priced at market levels:

In circumstances where a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element. Such a finding in the case of switching for large volume customers is predicated in large part upon the fact that competitors can acquire switching in the marketplace at a price set by the marketplace. Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.

Accordingly, BA-MA is obligated pursuant to § 271(c)(2)(B)(vi) of the competitive checklist to provide local switching unbundled from local transport, local loops and other services, even for customers with 4 or more lines in Density Zone 1 central offices. However, the rates for such local switching are not governed by the FCC's TELRIC standard but may be set at market levels.

BA-MA is currently considering the pricing of local switching within the Density Zone 1 offices. If BA-MA determines that it will change the rates, it will attempt to negotiate those rates with CLECs. Until new rates become effective, BA-MA will continue offering the switching component of existing UNE-P arrangements at the approved TELRIC rates.

The second manner in which the UNE Remand Order affects the existing UNE-P offering is related to the Operator Services/Directory Assistance ("OS/DA") component of the offering. When a CLEC goes through the network design process for UNE-P, it may either establish a customized routing arrangement or have BA-MA provide the OS/DA services as unbundled elements. BA-MA provides various branding options for CLECs that choose to use BA-MA's OS/DA services. A CLEC may elect to use its own brand for OS/DA, no brand, or the BA-MA brand. In Massachusetts, the four CLECs that have completed the network design process have chosen to use BA-MA's OS/DA services. Two of the CLECs have chosen to use their own branding, and the other two are using Bell

Atlantic branding.

In the UNE Remand Order, the FCC ruled that OS/DA is not subject to the unbundling requirements of § 251(c)(3). The FCC stated:

We find that where incumbent LECs provide customized routing, lack of access to the incumbents' OS/DA service on an unbundled basis does not materially diminish a requesting carrier's ability to offer telecommunications service. The record provides significant evidence of a wholesale market in the provision of OS/DA services and opportunities for self-provisioning OS/DA services. Moreover, we do not find that the evidence regarding the differences in cost, timeliness, quality, interoperability and ubiquity between the incumbent's OS/DA service and alternative OS/DA services, provided either through self-provisioning or third-party alternatives, is sufficient to conclude that lack of unbundled access to the incumbent's OS/DA service would materially diminish a requesting carrier's ability to offer the services it seeks to provide.

Accordingly, incumbent LECs need not provide access to its OS/DA as an unbundled network element. All LECs, however, must continue to provide their competitors with nondiscriminatory access to their OS/DA, pursuant to section 251(b), as implemented by the Commission. We believe that this outcome best comports with the realities of a growing OS/DA marketplace, embraces a deregulatory approach where justified, and does not unduly confine the entry strategies of competitive carriers.

BA-MA offers customized routing in connection with its local switching offering, and therefore, OS/DA is not subject to the unbundling requirement of § 251(c)(3).

BA-MA does, however, have an obligation under § 251(b)(3) of the Act and as a condition for InterLATA relief under § 271(c)(2)(B)(vii) to provide nondiscriminatory access to directory assistance and operator call completion services. BA-MA will thus continue to make these services available for existing UNE-P arrangements. As the UNE Remand Order makes clear, however, the fact that OS/DA is not subject to the unbundling requirement of § 251(c)(3) means that it need not be priced at TELRIC levels. Accordingly, BA-MA reserves the right to modify the rates for the OS/DA capabilities. BA-MA will attempt to negotiate those rates with CLECs. Until the new rates become effective, BA-MA will continue offering the OS/DA component of existing UNE-P arrangements at the approved TELRIC rates.

Finally, the FCC ruled that an ILEC was required to provide access to shared transport only when providing access to unbundled switching. In light of the FCC's ruling that local switching is not a network element that must be unbundled under § 251(c)(3) of the Act in Density Zone 1 offices for four lines or more, BA-MA is not required to provide shared transport in association with such switching. Bell Atlantic did, however, commit to provide shared transport as an unbundled element until August 14, 2001, as part of its merger commitments to the FCC. BA-MA will continue to meet that commitment. Prior to the expiration of the merger obligation, BA-MA attempt to negotiate any changes in the existing shared transport arrangements with CLECs.

To summarize, the FCC's UNE Remand Order affects BA-MA's existing UNE-P offering in three respects – the pricing of local switching for customers with 4 or more lines in Density Zone 1 central offices, the pricing of BA-MA's OS/DA accessed via the UNE-P arrangement, and shared transport unrelated to UNE local switching. The FCC has ruled that these are not network elements which must be unbundled under § 251(c)(3) of the Act. Although BA-MA is obligated to provide local switching in Density Zone 1 and OS/DA under the competitive checklist in 271 of the Act, the FCC had determined that checklist elements are not subject to the TELRIC pricing standard applicable to § 251(c)(3) unbundled network elements. BA-MA will attempt to negotiate market-based rates with CLECs. Moreover, BA-MA will comply with its merger commitment regarding shared transport and continue offering the element at TELRIC prices for the duration of the commitment.

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2. New Local Loop and Local Circuit Switching Combinations 2. New Local Loop and Local Circuit Switching Combinations

The Department's Phase 4-J Order required that BA-MA comply with FCC Rule 315(b) regarding the provision of existing assembled UNEs. See Phase 4-J Order, at 9. With respect to new loop and switching combinations – combinations of previously uncombined local switching and local loops – the Department's Phase 4-K Order directed BA-MA to develop alternative approaches, which could include providing combinations of previously uncombined UNEs, with a glue charge. Phase 4-K Order, at 27. As described earlier, BA-MA complied with the Department's directive on June 18, 1999, with a proposal to offer new UNE-P combinations for the provision of residential and business POTS service and residential and business Basic Rate Interface ISDN service (BRI ISDN switch port and premium loop) under certain conditions. The Department has yet to investigate this proposal.

BA-MA has interpreted the Department's Phase 4-J and Phase 4-K Orders as drawing a distinction between combinations that already exist in combined form in BA-MA's network for a specific end-user customer (i.e., existing combinations) and combinations of elements that are not assembled but which must be connected by BA-MA to provide service for a specific end-user (i.e., new combinations). The Department has requested that the Parties address in these comments the following question: "Should the definition of 'UNEs that were previously combined' be limited to discrete physical elements on a customer-specific basis or should the definition be viewed more generically as UNEs that were previously combined by Bell Atlantic for the offering of any retail product to any retail customer?"

The answer to this question involves interpretation of FCC Rule 315(b), which was the basis for the Department's Phase 4-J Order. At this point, the FCC has not issued a definitive ruling on the scope of its rule. On the contrary, in the UNE Remand Order, the FCC expressly declined to decide the very question posed by the Department and noted that the issue was still pending before the Eighth Circuit Court of Appeals. The FCC observed:

A number of commenters argue that we should reaffirm the Commission's decision in the Local Competition First Report and Order. In that order the Commission concluded that the proper reading of "currently combines" in rule 51.315(b) means "ordinarily combined within their network, in the manner which they are typically combined." Incumbent LECs, on the other hand, argue that rule 51.315(b) only applies to unbundled network elements that are currently combined and not to elements that are "normally" combined. Again, because this matter is currently pending before the Eighth Circuit, we decline to address these arguments at this time.

Given the FCC's decision to await the Eighth Circuit's ruling on this point, the Department should not decide the matter here.

The Department also does not have to decide the matter at this time because BA-MA has reassessed its position concerning new loop and local switching UNE-P combinations. BA-MA will voluntarily provide that combination even where the loop and local switching elements comprising the UNE-P do not already exist in combined form for a specific customer in its network. BA-MA will offer this combination throughout Massachusetts under the same terms as for existing loop and local switching combinations, subject only to the limitations discussed above with respect to Density Zone 1 switching, Density Zone 1, shared transport, and OS/DA. This addresses the principal type of combination that the CLEC Parties in this case have sought and satisfies fully any Department concerns about a differentiation between existing and new UNE-P arrangements. The Department also does not have to decide the matter at this time because BA-MA has reassessed its position concerning new loop and local switching UNE-P combinations. BA-MA will voluntarily provide that combination even where the loop and local switching elements comprising the UNE-P do not already exist in combined form for a specific customer in its network. BA-MA will offer this combination throughout Massachusetts under the same terms as for existing loop and local switching combinations, subject only to the limitations

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discussed above with respect to Density Zone 1 switching, Density Zone 1, shared transport, and OS/DA. This addresses the principal type of combination that the CLEC Parties in this case have sought and satisfies fully any Department concerns about a differentiation between existing and new UNE-P arrangements.

3. Enhanced Extended Links. Enhanced Extended Links

The UNE Remand Order addressed Enhanced Extended Links or "EELs" in two different contexts. First, the offering of EEL is a condition for an ILEC that wishes to avail itself of the local switching exclusion described above. BA-MA has an EEL offering that not only conforms in most respects to the UNE Remand Order but goes beyond the FCC requirements. Second, the FCC sets forth a limited stand-alone obligation to provide enhanced extended loops.

The FCC began its discussion of the EEL obligation by noting that the Eighth Circuit is currently reviewing the question of whether it should reinstate the FCC rules relating to combining elements that are not "ordinarily combined" in the incumbent's network. (As noted above, those rules were previously vacated by the Eighth Circuit, and are not currently in effect.) Accordingly, it declined to reinstate those rules. The FCC also declined to modify its prior determinations in the Local Competition Order that loops and transport are separate elements, and that Rule 315(b), relating to pre-existing combinations, refers to elements that are "ordinarily combined within [incumbents'] network, in the manner which they are typically combined". In light of these determinations, the FCC concluded only that "incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs". Moreover, the FCC left unresolved the question of whether, to prevent "special access arbitrage", restrictions should be placed on the use of "entrance facilities" between an incumbent LEC's serving wire center and an interexchange carrier's point of presence, that might be included in extended loop arrangements. That issue was made the subject of a further Notice of Proposed Rulemaking.

The FCC clarified its ruling concerning EELs in the Supplemental Order of November 24, 1999. The FCC ruled that until it completes a further rulemaking "interexchange carriers ["IXCs"] may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties)" unless "an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer."

BA-MA filed an EEL tariff, which is currently pending Department review in D. T. E. 98-57, in compliance with the Department's Phase 4-K Order. The proposed EEL offering is available for both new and existing combinations. As filed, the EEL offering is limited to 2-wire analog and digital ISDN-capable loops and requires that the CLEC use the service predominantly to provide switched local exchange service. BA-MA's proposal goes beyond the FCC requirement because it does not distinguish between new and existing loop and dedicated transport combinations, whereas the UNE Remand Order addresses only existing loop and transport combinations under Rule 315(b). The offering differs from the UNE Remand Order, as modified by the Supplemental Order, in only three respects.

First, in the UNE Remand Order, the FCC found that a CLEC could provide its own local switching and determined that UNE local circuit switching need not be unbundled in Density Zone 1 if the BOC provided access to EELs. BA-MA's EEL proposal was limited to certain specific types of loops and may not include all loop types that a CLEC could use to provide local circuit switched service. For this reason, BA-MA will modify its EEL proposal to include the different loop types that can be used by CLECs in connection with their local circuit switched service. Second, BA-MA proposed limiting the offering to cases in which the dedicated transport element terminated at a CLEC collocation node. The UNE Remand Order indicated that the dedicated transport component may terminate at an ILEC switch. See UNE Remand Order, at ¶ 480. BA-MA will add this capability to its proposed tariff. Finally, in the

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Supplemental Order, the FCC limited the use of the EEL combination to cases where it is being used by the CLEC to provide a significant amount of local exchange service to its customer or is being used to provide advanced DSL service to the CLEC's customer. BA-MA's tariff will amend its tariff to clarify the use restriction as set forth in the Supplemental Order. These revisions will apply to both new and existing EEL combinations and give CLECs in Massachusetts more expansive EEL offering than required by the FCC in the UNE Remand and Supplemental Orders.

4. Switch Sub-Platform Combination

Among the voluntary UNE combinations BA-MA proposed in this case, which the Department approved, was a switch sub-platform for CLECs who purchase the UNE local switch element. See BA-MA's April 17, 1998, Submission On Unbundled Network Element Provisioning. The switched sub-platform provides CLECs with access to additional UNEs on the network side of the switch, combined by BA-MA, without any need for CLEC collocation. Specifically, the switch sub-platform includes access to shared and dedicated transport for interoffice and interexchange access transport (including tandem switching, where relevant), access to signaling (STPs and other databases), access to 911/E911 transport and tandems or other 911/E911 aggregation switches on the BA-MA network, and access to BA-MA operator services and directory assistance UNEs. BA-MA included in its Interconnection Tariff, D.T.E. - Mass. - No. 17 terms for the switch sub-platform, which the Department is reviewing in D.T.E. 98-57.

As discussed above, the FCC has ruled that local switching in certain offices, and the related shared transport, as well as OS/DA are not network elements subject to the unbundling requirement of § 251(c)(3) of the Act. Because BA-MA is otherwise required to provide these elements, the significance of their exclusion from the list of § 251(c)(3) elements is one of pricing - not availability. The pricing of the elements comprising the switch-sub-platform combinations should follow the pricing of the individual elements. BA-MA will, as noted previously, file with the Department any rate changes for elements authorized by the UNE Remand Order.

B. AT&T Motion for Reconsideration

On June 10, 1999, AT&T filed a Motion seeking reconsideration of the Department's Phase 4-K Order. AT&T argued that the Department was mistaken in two respects: (1) its conclusion that the Eighth Circuit's decision regarding 47 C.F.R. §§ 315(c)-(f) remained good law, because the rationale for that decision has been firmly rejected by the United States Supreme Court; and (2) in any case, the Department has erred by declining to determine whether it retains authority to require BA-MA to provide additional UNE combinations (AT&T Motion, at 7). Both of these arguments are without merit, and AT&T's Motion should be denied.

First, as the Department correctly ruled in both the Phase 4-J and 4-K Orders, the Supreme Court Decision did not affect the Eighth Circuit's original mandate vacating §§ 51.315(c)-(f) (which requires an incumbent LEC to combine its own network elements in any technically feasible manner and to combine the incumbent's network elements with those of a requesting carrier). See Phase 4-K Order, at 8 ("[T]he Supreme Court did not address the FCC's rules that required ILECs to combine 'uncombined' network elements for competitors. See 47 C.F.R. § 51.315(c)-(f). The Eighth Circuit ruling vacating those rules was not on appeal, and those rules remain vacated."); Phase 4-J Order at 4 n.7. The Department made its ruling after extensive briefing by the parties in this docket addressing the implications of the Supreme Court decision on UNE-P in Massachusetts.

Indeed, the FCC's action in which it expressly declined in the UNE Remand Order to reinstate Rules § 51.315(c)-(f) validates the Department's decision to decline to require new combinations of network elements. See UNE Remand Order, at ¶ 481 ("We also decline to reinstate rules 51.315(c)-(f). ¼ [T]his issue is currently pending before the Eighth Circuit.") The Department has no basis to reinstate rules where the agency that initially issued them has refused to do so. If the FCC or the Eighth Circuit reinstate the rules, BA-MA will comply.

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Second, AT&T's argument that the Department erred in not deciding, as a matter of state policy, that BA-MA should be required to combine network elements is likewise without merit. Throughout this stage of the proceeding, the Department has consistently looked to the ruling of the FCC and the federal courts to establish the scope of BA-MA's obligation to combine UNEs for its competitors. The Department's Phase 4-E Order relied on the Eighth Circuit's ruling, which held that an ILEC could not be mandated to combine UNEs. The Phase 4-J Order was grounded in the Supreme Court's reinstatement of the FCC rule requiring the combination of elements that already existed in combined form in the ILEC's network. The Phase 4-K Order expressly relied on the fact that the FCC's rules regarding new combinations remained vacated. The Department has chosen a reasonable and appropriate course in this case. AT&T has not brought to light new previously unknown or undisclosed facts that would have a significant impact upon the decision or shown that the Department's treatment of the issue was the result of mistake or inadvertence. These are the standards for reconsideration, and AT&T has failed completely to meet the standards. AT&T's dissatisfaction with the Department's decision to follow the FCC and court rulings is hardly grounds for granting a Motion for Reconsideration.

Moreover, given the FCC's UNE Remand Order and BA-MA's offer here to eliminate the difference between existing and new UNE-P arrangements, it is difficult to discern the remaining objections AT&T may have with the current status of the issue. UNE-P will be available throughout Massachusetts without restriction, subject only to future price changes affecting certain elements that the Department will review. Other combinations will be provided in accordance with FCC rules. There simply is no need for the Department to attempt to craft some new or different rule to address the combination issue.

III. CONCLUSION

The FCC's UNE Remand Order has provided necessary clarification regarding the network elements subject to the unbundling requirement of § 251(c)(3) of the Act. The order largely affects the pricing of certain elements and not the availability of elements either individually or in combined form. BA-MA's offer here to provide unrestricted UNE-P, subject only to authorized price changes in certain elements, addresses fully the concerns that the Department has noted. BA-MA's other proposals for EEL and switch sub-platform require few changes to conform to the FCC's order. The Department is not required to take any further action in this stage of the proceeding.

Respectfully submitted,

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